IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1632 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF BADARMAL H. JAIN - GAUTAMCHAND B JAIN

Versus

HEIRS OF RATANBEN V.- SUSHILABEN W/O MANUBHAI P

Appearance:

MR AJ PATEL for Petitioners

MR SK JHAVERI FOR MR KS JHAVERI for Respondents

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 31/03/2000

01/04/2000

ORAL JUDGEMENT

1. This is a revision application u/s 29[2] of the Bombay Rent Act at the instance of the original tenant

defendant.

2. The respondents - landlords had sued the defendant - tenant for a decree of eviction under the provisions of the Bombay Rent Act on three grounds, namely, arrears of rent of more than six months, bonafide requirements of the landlords, and change of user of the premises on part of the tenant within the meaning of section 13[1][k] of the said Act, and on the tenant having acquired another residence within the meaning of section 13[1][l] of the Act. The trial Court, after recording the evidence and hearing the parties, dismissed the suit of the landlords on all the grounds.

2.1 The landlords therefore preferred an appeal u/s 29[1] of the Rent Act to the appellate Court. The lower appellate Court, after re-examining the evidence on record, dismissed the appeal, and the claim of the landlords so far as the ground of arrears of rent of more than six months is concerned, and similarly dismissed the appeal, so far as claim of the landlords as to bonafide and reasonable requirements of the landlords is concerned. However, the lower appellate Court found in favour of the plaintiffs - landlords, and reversed the finding of the trial Court so far as the change of user of the premises and alternate residence acquired by the tenant is concerned.

2.2 Hence, the present revision by the tenant, challenging the judgement and decree of the lower appellate Court on the aspect of change of user of the leased premises is concerned, within the meaning of section 13[1][k] of the Rent Act, and the finding on section 13[1][l] of the Act.

3. In order to correctly appreciate the controversy between the parties, and in order to come out of the assumptions and totally erroneous perspective adopted by the lower appellate Court, it is necessary to examine the relevant statutory provision. Section 13[1][k] of the said Act reads as under :-

> Section 13[1][k] :: That the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit;

> Section 13[1][l] of the Act reads as under :

Section 13[1][l] :: That the tenant after the coming into operation of this Act has built, acquired vacant possession of or been allotted a suitable residence.

3.1 In this context, it must be clarified and also emphasized, in order to retain clear a perspective on the entire controversy, that it is nobody's case and certainly not the landlords' case, that the premises were not used at all, that is to say, were kept closed or locked or abandoned for a period of six months prior to the suit. The landlords' precise case is that the premises have not been used for a period of six months immediately preceding the date of the suit for the purpose for which they were let.

4. In order to retain a clear perspective of the matter, therefore, the lower appellate Court ought to have appreciated that it was for the landlords plaintiffs to establish that the tenant had in respect of the specified six month period, used the premises for a purpose other than the purpose for which they were let. It goes without saying that the landlords could only establish this factual position if the landlords first establish what was the purpose of letting. It is obvious that it is for the landlords - plaintiffs to establish the actual purpose of letting, without which the landlord could not possibly establish that the actual user was for a purpose other than the purpose of letting. The lower appellate Court has clearly lost sight of this legal requirement, and has over a large number of pages rambled only about the oral evidence of the parties, and has drawn unwarranted and unjustified inferences from the actual use to which the premises were put by the tenant.

5. First of all, the purpose of letting could be established by examining the written contract between the parties namely, the rent note at exh.21.

5.1 The Courts below have rested content with observing that, "the rent note is not at all clear as to the purpose of letting" and that, "the rent note is silent as to the purpose of letting". This so called lack of clarity and the silence of the rent note could only arise where the perspective itself is not clear, and the appreciation of the document is not free from confusion. What is absolutely clear from the rent note exh.21 is that there is absolutely no reference in the document as to the purpose of letting. Further more, if

it can possibly be said that the rent note is "silent" as to the purpose of letting, this silence is in itself very eloquent as to the fact that there is positively no restrictive covenant as to the user. The only conclusion which can be drawn from this document is that the contract of letting between the parties did not restrict the tenant from putting the leased premises to any particular use. It is obvious that the total absence of any restrictive covenant as to the nature of user on the part of the tenant, would enable the tenant to put the leased property to any reasonable use, that is to say, use it for residence or to use it for business purposes.

6. The lower appellate Court has devoted pages and pages in useless discussion of what otherwise is an admitted position. The tenant has frankly admitted that when he took the premises on lease, he had actually used the same for residential purposes. This use continued for a number of years. At that point of time, he was a petty hawker, hawking his goods from door to door and therefore, he had no business assets worth the name which would require separate business premises. Thereafter, over a period of years, as his business improved, as the tenant has admitted, he took another premises on lease for conducting his actual business. Thereafter, as he progressed in life and business, he built a bungalow in the name of his wife, and thereafter shifted his residence from the leased premises to the said bungalow and began to store his business goods in the leased premises. All these developments are frankly admitted by the tenant.

6.1 What the lower appellate Court has failed to appreciate is that these admissions in no way pertain to the obligation of the tenant to put the leased premises only to a particular use. The lower appellate Court has, after an unnecessary and lengthy discussion of this state of affairs on record, merely came to a conclusion that, for a long number of years, the tenant had in fact used the premises as his residence, and that therefore, the purpose of letting was for residence. The lower appellate Court clearly failed to appreciate the distinction between the actual user and purpose of letting. What the lower appellate Court failed to appreciate and has failed to consider the question as to whether, for a number of years, when the tenant actually put the leased premises to use as a residence, whether it was merely a voluntary act on his part or whether it was under compulsion of any term or condition of the tenancy. This question has not been addressed by the lower appellate Court at all, because of the faulty perspective

adopted by it. The lower appellate Court has merely reached the conclusion, on the basis of an assumption, that since for a number of years the actual user by the tenant was for residence, that was the only purpose of letting. The lower appellate Court failed to appreciate that a plain reading of section 13[1][k] would indicate that, before any decree of eviction can be passed on that ground in favour of the landlord, the landlord must first prove and establish the purpose of letting, and then establish by evidence on record that the purpose of letting has been violated by the tenant. Obviously, on the facts of the case, the landlords have failed to establish that the purpose for letting was restricted to use as a residence. Under these conditions, even if the tenant has changed the nature of user, as admitted by him, the same cannot amount to breach of the terms and conditions of tenancy, neither can it be said that he has used the premises for a purpose other than the purpose of letting.

6.2 In the premises aforesaid, the alternative contention of the landlord that he is also entitled to a decree u/s 13[1][l] of the Rent Act, on the ground that the tenant has acquired "other suitable residence" does not really survive for serious consideration. It is well settled, both by a series of decisions, and is also apparent on the face of section 13[1][l] that this provision would entitle the landlord for a decree of eviction only in respect of premises let out only for residential purpose and for no other purpose. It is obvious that if the premises were let out for business purpose or industrial purpose or commercial purpose, the fact that the tenant has acquired other residential accommodation would be of no relevance whatsoever. It is equally obvious that once it is found that the premises were let out not exclusively for residence, and that other uses were also permissible, as found in the facts of the present case, the provisions of section 13[1][l] would have no application whatsoever. Therefore, the landlord would not be entitled to a decree for eviction, on the facts of the case, even u/s 13[1][l] of the said Act.

6.3 It was also sought to be contended by the landlords that the tenant had admittedly, after the letting of the property to him, first put the property to residential use, and that therefore, this must be deemed to be the purpose of letting. This submission is based upon the doctrine more popularly known as "Dominant Purpose Test".

6.4 No doubt, the first use to which the tenant had put a newly leased premises can in the normal course of events be presumed to have been lawful use, that is to say, such use was permissible by the terms of tenancy. Such a presumption is based on the common sense test that normally a tenant would not, immediately after the letting, put the property to unlawful use. However, such actual user although permissible under the terms of tenancy does not and cannot create any presumption that any other user was ipso facto outside the terms of tenancy.

6.5 This concept therefore requires to be examined in greater detail for the purpose of truly appreciating the scope as also the inherent limitations of the "Dominant Purpose Test".

6.6 Learned counsel for the landlords sought to place reliance upon a decision of this Court in the case of Dolatrai Harjivan Bibodi and anr. v/s Dr. Kantilal Sukhlal Shah reported in 18 GLR Page 848, and particularly the observations in para 4 thereof. It must however be noted that this decision deals only with the interpretation and application of section 13[1][l] of the said Act, on the allegation that the tenant has acquired other suitable residence, and it is only in this limited context that the "dominant purpose test" has been applied. It must be noted that this decision, even while applying the dominant purpose test in the context of section 13[1][l], does not envisage or entertain the possibility that there can be cases where the purpose of letting is not restricted to one purpose, and that multipurpose user was permissible. Once, when the possibility of multipurpose user is envisaged or contemplated, the dominant purpose test fails to provide a solution to the basic controversy as to whether the tenancy was restricted to a single purpose or not. Obviously therefore, the dominant purpose test could only be strictly applied to consideration of cases u/s 13[1][l] alone. Thus, by its own nature, and the different concept contemplated by section 13[1][k], the "dominant purpose test" has no application at all to section 13[1][k].

6.7 In this context, learned counsel for the respondents has sought to place reliance upon a decision of the Bombay High Court in the case of Babhutmal Raichand Oswal v/s Laxmibai Raghunath Tarte reported in 74 BLR Page 214. At this stage, it is relevant to note that even a plain reading of section 13[1][k] indicates

that the tenant is not completely and totally barred from putting the property to such use other than the purpose for which it was let. A decree for eviction under this provision can only be passed if the tenant is unable to furnish justification for the change of user. In other words, if the landlord establishes that the premises have not been used for the purpose for which they were let "without reasonable cause", only then would the Court be enabled to pass a decree for eviction. Thus, the decisions pertaining to the dominant purpose test must be examined in the context of "without reasonable cause", apart from other relevant aspects discussed hereinafter. On the facts of the case, the Bombay High Court had occasion to observe on page 216 of the said decision as under :-

> "Both the Courts have, after assessment of the entire evidence, concluded that the premises were not let for the composite purpose of business and residence. The tenancy was for the specific purpose of conducting a shop or business in the suit premises. I cannot accept the contention of Mr. Mistry that the finding is not based on any admissible evidence. It is a finding of fact and it cannot be assailed in proceedings under Article 227 of the Constitution."

I refer to this passage for the simple reason that the subsequent observations made in the said decision are based on a firm and incontrovertible finding that the tenancy was limited in terms of the user of the premises, that is to say for a shop or business.

6.8 The Bombay High Court thereafter observed on page 217 of the said decision as under :-

> "After consideration of these submissions, I am of the opinion that the correct legal position is that the Court has to find out whether or not the plaintiff had succeeded in establishing his ease that there has been a change of use of the premises. If the plaintiff shows that the premises have been wholly used for a different purpose, and once that fact is established, nothing further need be considered by the Courts. If, on the other hand, the plaintiff proves that the defendant - tenant has started using the premises for some other additional purpose, while continuing to use it for the purpose for which they were let, then certainly the Court will have

to decide whether the additional purpose constitutes the primary or dominant use. As this arises on the allegation of the plaintiff himself, even in the absence of a specific plea raised in the written statement the Court will have to consider the evidence on record and record a finding one way or the other."

This by itself clearly establishes the proposition discussed by me earlier to the effect that if the landlord alleges restrictive user confined to one specific purpose to the exclusion of all other purposes, it is a burden cast upon the landlord to establish the same by appropriate evidence.

6.9 The Bombay High Court then had occasion to observe on page 219 of the said decision as under :-

"As stated above, the wording of the two clauses of the sub-section provide no guidelines. But the object of the Rent Act is to protect tenants against indiscriminate eviction by landlords. Whenever the landlord complains that the tenant has changed the use of the premises, then the Courts must find out in the first instance the original purpose for which the premises are let. If the tenant is found to use the premises for an additional purpose or a purpose different from the purpose for which the premises were let, then it must be found as a fact in every case as to what is the dominant or primary use of the premises vis-a-vis the purpose of letting. It will be a question of fact to be decided in each particular case having regard to all the circumstances. It is not possible to give a list of all the relevant factors but Courts must bear in mind that the Rent Act is enacted primarily for protecting tenants against indiscriminate eviction. The tenants have no such protection under the general law which applies to all leases. It may be that a landlord has rushed to the Court on flimsy or superficial grounds. Or it may be that a tenant in a given case is trying to exploit the situation. In all such cases the Courts have to record a finding about the dominant or primary use of the premises vis-a-vis the purpose of letting. Some times the extent or mode of use may be a relevant factor. But it is difficult to lay down any definite objective test

in this behalf."

Even this observation indicates that it is for the landlord to establish by incontrovertible evidence "the original purpose for which the premises are let". The original purpose of letting is therefore not a question of presumption, nor can it be derived from the probabilities of the case. It is not a matter of deduction based only upon the conduct of the parties namely, the first use to which the property was put after letting.

6.10 Learned counsel for the respondents then sought to rely upon the decision of the Supreme Court in the case of Prem Chand v/s The District Judge, Dehradun and anr. reported in AIR 1977 SC 364. I fail to understand how this decision would be of any assistance to the landlords for the simple reason that it is based not only upon the facts of the case, but is specifically based upon Explanation (iv) to section 21[1] of the U.P. Urban Building [Regulation of Letting, Rent and Eviction] Act, 1972, which provides for an irrebuttable presumption. It is for this reason that the Supreme Court observed in para 6 of the said decision to the effect that, if the tests laid down by explanation (iv) are satisfied, it will furnish under the law, a conclusive proof that the building is bona fide required by the landlord. [emphasis supplied]

6.11 Learned counsel for the landlords then sought to rely upon a decision of the Supreme Court in the case of Sant Ram v/s Rajinder Lal and ors. reported in AIR 1978 SC 1601. Once again, I am constrained to observe that this decision would be of no assistance to the learned counsel for the landlords for the simple reason that the same is based upon the appreciation of evidence and on the facts of that case, so far as section 13 of the East Punjab Urban Rent Restriction Act is concerned. In this case before the Supreme Court, the purpose of letting was not disclosed in the lease deed. In other words, there was a total absence of any restrictive or negative covenant as to the purpose of letting. In this context, the Supreme Court observed in para 6 as under :-

"The life style of the people shapes the profile of the law and not vice-versa. Law, not being an abstraction but a pragmatic exercise, the legal inference to be drawn from a lease deed is conditioned by the prevailing circumstances. The

> intention of parties from which we spell out the purpose of the lease is to be garnered from the social milieu. Thus viewed, it is difficult to hold, especially when the lease has not spelt it out precisely, that the purpose was exclusively commercial and incompatible with any residential use, even of a portion."

It must be noted however, the Supreme Court refused to read into the terms of tenancy any negative, restrictive or prohibitory covenant, when it was not found on the face of the Lease Deed.

7. Inspite of the aforesaid decisions, sought to be relied upon by the learned counsel for the landlords, it is nevertheless contended that "the dominant purpose test" only lays down one criteria namely, the first use to which the property was put after letting. According to the learned counsel for the landlords, this must be held to be the purpose of letting.

7.1 If we examine this interpretation put by learned counsel for the landlords upon the said doctrine, many questions would arise which cannot be answered, and would in other cases lead to incongruous or ridiculous results.

7.2 Is it inconceivable or outside the realm of possibility that the parties may have agreed not to limit the nature of user of the premises (without so specifying in the lease deed)? The obvious answer to this must be in the negative. It is always possible that the parties may not have thought it necessary to incorporate in the lease deed the possibility or permissibility of unrestricted user, if the parties were ad idem on this issue. Under such circumstances, if the tenant, after letting, first put the property to residential use, it was certainly open to him and even according to the doctrine, a use which was permissible so far as the terms of tenancy specify. However, if such use is taken to be the only use to which the property can be put to, it would be a serious restriction upon the right of the tenant, which restriction is not specifically contemplated by the terms of the lease.

7.3 The "Dominant Purpose Test", as professed by learned counsel for the landlords, does not envisage this possibility. According to the learned counsel, the test is intended only to identify the purpose of letting. However, can this submission lead to a conclusion that this test will identify the purpose of letting as the only purpose of letting? The question then would be,

would this test identify a singularity and exclusivity of the user, or by itself and ipso facto, rule out the possibility of plurality, that is to say, possibility of multiple uses? It is obvious that the test cannot be extended to ipso facto ruling out the plurality and possibility of multiple user. As observed in the aforesaid decisions, in the absence of any restrictive covenant in the lease deed, the intention of the parties, even as regards the exclusivity (or the plurality) of user must be culled out not only from the facts of the case, but from the "social milieu".

7.4 It is for these reasons that it must be found that "the Dominant Purpose Test" is relevant in the context of, and can apply only to section 13[1][l] and not to section 13[1][k].

7.5 It is not merely an admitted position but also an assertion of fact on part of the landlord that the tenant had shifted his residence to a bungalow constructed by him six years prior to the suit. For six years, the landlord took no action and made no complaint as regards the so called change of user. This aspect albeit is not conclusive of any fact, but is certainly indicative of the possibility that, for six long years, the landlord did not regard this act on part of the tenant to be constituting any cause of action for a decree of eviction under section 13[1][k] or even u/s 13[1][l].

8. The hearing of the above matter and dictation of the judgement in open court was commenced on 24th March 2000. However, on a specific request of learned counsel for the respondent no.1 the matter was deferred to today i.e. 31st March 2000.

8.1 On 31st March 2000 Civil Application No.2115/2000 has been preferred in this revision at the instance of two applicants who professed to be the purchasers of the suit property from the original landlord by registered sale deed dated 23rd January 1995.

8.2 No prima facie proof of the purchase is offered. Even otherwise, the applicants have preferred this Civil Application five years after the purchase, and the application itself is filed on 30th March 2000, after the above portion of the judgement was dictated in the open court.

8.3 However, in the interests of justice I do not propose to exclude the purchasers of the property from the present revision. The said Civil Application is

accordingly granted by a separate order passed thereon. The new purchasers of the property have been joined as respondents No.6 and 7 in this Revision, and their counsel is heard on all issues.

9. Consequently, this revision application requires to be allowed and is accordingly allowed. Rule is made absolute with no orders as to costs.

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